FILED
AUG 26 1
CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 245

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TOM LEEMING,
OWEN RALL,
RICHARD V. HENRY, JR.,
135 S. LaSalle Street,
Chicago, Illinois,
*Attorneys for Petitioner.*

THE BURTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

## INDEX AND SUMMARY OF ARGUMENT.


| | PAGE |
|---|---|
| Petition for Certiorari | 1 |
| Basis of Jurisdiction | 2 |
| Statement of Matter Involved | 2 |
| Questions Presented | 5 |
| Reasons for Allowance of Writ | 5 |
| Brief in Support of Petition | 7 |
| Opinion of Court Below, citation | 7 |
| Specification of Errors | 7 |
| Summary of Points: | |
| I. The decision of a majority of the Circuit Court of Appeals in effect holding that concerted activity directed to any aspect of the employer's business is within the protection of the National Labor Relations Act raises for the first time important questions as to the construction of Section 7 and Section 8(a)(1) of the Act | 8 |
| II. Whether an ordinary life insurance agent—not to be confused with a "debit collector" of industrial policies—is an employee or an independent contractor is a question of substantial importance, not only under the National Labor Relations Act but also under the Social Security Act and Internal Revenue Code | 12 |
| III. The holding of the Circuit Court of Appeals that the so-called "unfair labor practices" need not be shown to have been a burden upon interstate commerce is contrary to the intention of the Act, to previous decisions of this Court and to the previous decisions of the Circuit Court of Appeals | 19 |

CASES CITED.

American National Insurance Company v. Denke, 128 Texas 229, 95 S. W. 2d 370, 107 A.L.R. 409..... 18

American Savings Life Insurance Co. v. Riplinger, 249 Ky. 8, 60 S. W. 2d 115..... 18

Bartels v. Birmingham, 332 U. S. 126.....14, 15, 17

Budd Manufacturing Company v. N.L.R.B., 332 U. S. 840 ..... 14

Chatelain v. Thackeray, 98 Utah 525, 100 Pac. 2d 191.. 18

Harrison v. Greyvan Lines, Inc., 331 U. S. 704.....14, 15

Indianapolis Power & Light Co. v. N.L.R.B., 122 F. 2d 757, 760 ..... 21

In the Matter of Inland Steel Company and Local Union Nos. 1010 and 64, United Steel Workers of America (CIO), 77 N.L.R.B. 1..... 12

Life and Casualty Co. v. Unemployment Compensation Commission of Virginia, 178 Va. 46, 16 S.E. 2d 357.. 18

Luquire Insurance Co. v. McCalla, 244 Ala. 479; 13 So. 2d 865 ..... 18

N.L.R.B. v. Hearst Publications Inc., 322 U. S. 111.. 13

N.L.R.B. v. Indiana Desk Company, 149 F. 2d 987.... 10

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 31, 32 ..... 20

N.L.R.B. v. Sands Manufacturing Company, 306 U. S. 332 ..... 10

New York Life Insurance Company v. Murphy, 388 Ill. 316, 319, 320, 58 N. E. 2d 182..... 18

Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U. S. 453, 467 .....20-21

Southern Steamship Company v. N.L.R.B., 316 U. S. 31 10

United States of America v. Silk, 331 U. S. 704.....14, 15

Vert v. Metropolitan Life Insurance Company, 342 Mo. 629, 117 S. W. 2d 252, 116 A.L.R. 1381..... 18

William v. United States, 126 F. 2d 129 (cert. denied 317 U. S. 655)..... 17

L. A. Young Spring & Wire Corporation v. N.L.R.B., 163 F. 2d 905 (C.C.A. Dist. of Col., 1947) (certiorari in effect denied Foreman's Association of America v. L. A. Young Spring & Wire Corporation, 333 U. S. 837) ..... ..... 14

STATUTES CITED.

Gearhart Resolution P. L. 642, L. 1948..... 15

Labor Management Relations Act, 1947, Public Law No. 101, 80th Cong., 1st Sess., Chap. 120..... 13

National Industrial Recovery Act, 48 Stat., 198, U.S.C. title 15, sec. 707(a)..... 9

National Labor Relations Act, 49 Stat. 449, 29 U.S.C., Section 151 *et seq*.....8, 20

Note: Where reference is made to "the Act" or sections thereof, we refer to the National Labor Relations Act as amended by the Labor Management Relations Act, 1947. We have not indexed the numerous instances in which a general reference of this nature has been made.

LEGISLATIVE AND ADMINISTRATIVE PROCEEDINGS.

H. R. Report No. 1147, 74th Cong., 1st Sess., pp. 15, 17 . . 9, 10

H. R. Report No. 245, 80th Cong., 1st Sess., p. 18 . . . . 13

H. R. No. 1319, 80th Cong., 2nd Sess., pp. 2, 12 . . . . . 16-17

Senate Report No. 573, 74th Cong., 1st Sess., pp. 8, 9 . . 9, 10

Senate Report No. 1255, 80th Cong., 2nd Sess., p. 7 . . 15-16

United States Treasury Department Regulations 90, promulgated under Title IX of the Social Security Act, Art. 205 . . . . . 14

United States Treasury Department Regulations 107, filed September 13, 1940, Section 403.225 . . . . . 14

United States Treasury Department Regulations 111, Sec. 29.143-2 . . . . . 15

United States Treasury Department Regulations proposed by the Treasury Department and published in F. R. Vol. 12, No. 232, dated November 27, 1947, at page 7966 . . . . . 15

**Special Notice Regarding Record References.**

The printed record in the Court below consisted of an Appendix filed by the National Labor Relations Board, petitioner below, and an Additional Appendix filed by the Phoenix Mutual Life Insurance Company, respondent below. These printed pamphlets are now before this Court in their original form and are referred to herein, respectively, as "Board's App." and "Company's App." Page references are to the original pagination of such appendices. The proceedings in the Court below have been printed and filed herein, numbered separately, and are referred to herein thus, "Tr. 11".

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1948.

---

No. .....

---

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

---

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Phoenix Mutual Life Insurance Company, a corporation organized and existing under the laws of the State of Connecticut, prays this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a final decree of the said Circuit Court of Appeals enforcing an order of the National Labor Relations Board.

## I.

### Basis of Jurisdiction.

This is a petition to review on certiorari the decision of the Circuit Court of Appeals for the Seventh Circuit under the provisions of the Judicial Code, Section 240, as amended; March 3, 1911, C. 231, sec. 240, 36 Stat. 1157; February 13, 1925, C. 229, sec. 1, 43 Stat. 938. The decision of the Circuit Court of Appeals was rendered May 7, 1948 and the final decree was entered May 26, 1948. The case is reported below in 167 F. 2d 983.

## II.

### Short Statement of the Matter Involved.

This case is an enforcement proceeding under Section 10(e) of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. Sec. 151. et seq) as amended (Public Law No. 101, 80th Cong. 1st Sess. Chap. 120). The petition of the National Labor Relations Board to the United States Circuit Court of Appeals sought enforcement of its order issued against petitioner on June 6, 1947, following the usual proceedings under Section 10 of the Act (73 N.L.R.B. 1463; Board's App. 8-16).

The record in this case shows that petitioner (for clarity hereinafter termed the "Company") terminated the agency contracts of two of its life insurance salesmen, Davis and Johnson (Board's App. 210-211, 214). The Board contended that the contracts were terminated under circumstances that justified an application of the extraordinary remedies afforded by the Act (Board's App. 9-10). The Company's defenses raised the following issues for determination by the Court below:

**(1) Whether an Unfair Labor Practice Had Been Committed Within the Intent and Meaning of Section 8 (a) (1) of the Act.**

The record showed that at the time that the Davis and Johnson agency contracts were terminated, they were concerned, in concert with several of the other life insurance salesmen, with the appointment of a particular person as Cashier of the agency with which they were connected (Board's App. 102-106). It showed that they had two meetings to discuss the subject, and worked on the draft of a letter to the Company's Home Office with respect to the matter, but that this letter was never put into final form (Board's App. 105-106). The record further showed that the Cashier's Department was a division of the Company's organization separate and distinct from its Agency Department, of which Davis and Johnson were members, and that the cashier in question would have no direct responsibility to or for Davis and Johnson. Evidence was introduced, however, intended to show that Davis and Johnson were affected by the degree of efficiency with which the particular cashier performed her duties (Board's App. 86-92, 106).

The Board contended on these facts that the identity of the particular Agency cashier was a matter of legitimate concern to Davis and Johnson and as such entitled to the protection of the Act within the meaning of the language of Section 7 thereof which provides that "employees shall have the right * * * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". The Company contended, first, that the identity of the particular cashier was not a matter of legitimate concern to life insurance agents Davis and Johnson, as such a question had no reasonable connection with their activities in selling life insurance, and, second, that it was not the intention of Congress under the lan-

guage of Section 7 quoted above to protect concerted activity which, as is the case here, is totally unrelated to any question of union organization, collective bargaining or any of the other specific rights of employees that the Act is designed to protect. The Circuit Court of Appeals (Judge Major dissenting) held the activity of Davis and Johnson to be entitled to the protection of the Act, but cited no authorities to support that conclusion (Tr. 9).

**(2) Whether the Company's Life Insurance Salesmen, Davis and Johnson, Were Employees or Independent Contractors.**

Davis and Johnson were what are known as ordinary life insurance salesmen (Board's App. 183-191). The Company consistently contended below and contends now that on the record of this case, Davis and Johnson were independent contractors at common law and as such were excluded from the purview of the National Labor Relations Act by the 1947 amendment to Section 2 (3) of the Act which provides that:

> "The term 'employee' * * * shall not include * * * any individual having the status of an independent contractor * * * "

**(3) Whether the So-Called "Unfair Labor Practices" so Affected Interstate Commerce as to Vest the Board With Jurisdiction Over the Matter.**

The so-called "unfair labor practices" before this Court relate to the circumstances surrounding the termination of the agency contracts of two of the Company's ordinary life insurance salesmen, Davis and Johnson, and statements made to a third salesman, one Goldberg. It is asserted that the Company took this action because of certain "concerted activities" in which these men were engaging. The record shows that this activity pertained

exclusively to one letter relating to the appointment of one cashier in petitioner's Chicago-LaSalle office. The letter was discussed and put in rough draft form by the three individuals named above and several other of the Company's salesmen (Board's App. 104-107). The record clearly shows that neither union activity nor collective bargaining was involved. The record is also devoid of any showing that inter-state commerce was affected in any manner whatsoever by the above mentioned activity. This being the case, the Company contends that the Board may not properly take jurisdiction of the matter under the Act.

## III.

## The Questions Presented.

### A.

Whether collective action by employees directed solely to the general efficiency of the employer is entitled to protection under the Act.

### B.

Whether ordinary life insurance salesmen are employees or independent contractors under the Act.

### C.

Whether under the Act an alleged unfair labor practice must be shown to have affected or burdened interstate commerce in some way.

## IV.

## Reasons Relied On For the Allowance of the Writ.

(a) The decision of the Circuit Court of Appeals in the instant case in effect holds that any concerted employee activity for any lawful purpose is within the protection of

the National Labor Relations Act. Judge Major specifically recognized this result in his dissenting opinion. Such a conclusion raises for the first time important questions with respect to the construction of Section 7 and Section 8 (a) (1) of the Act, which provide as follows:

> Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * * "
>
> Section 8.
>
> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

(b) The decision holds that the Company's ordinary life insurance salesmen are employees at common law. This result raises important questions with respect to the construction of the 1947 amendment to Section 2 (3) of the Act and the Gearhart Resolution, P. L. 642, L. 1948. This decision is in conflict with the previous decisions of the Court below on the same subject, with the decisions of Circuit Courts of Appeal of other circuits and with the decisions of this Court.

(c) The Company's alleged unfair labor practices did not burden or affect interstate commerce in any way and did not give the National Labor Relations Board jurisdiction.

Respectfully submitted,

TOM LEEMING,
OWEN RALL,
RICHARD V. HENRY, JR.
*Attorneys for Petitioner.*

# BRIEF IN SUPPORT OF PETITION.

## A.

### Opinion of Court Below.

The opinion of the Circuit Court of Appeals is reported as *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Company*, 167 F. 2d 983, and in the printed transcript of record herein, p. 2.

## B.

### Specification of Errors.

The errors relied on are:

1. The Circuit Court of Appeals erred in holding that the concerted activities shown in the record in this case were such as to form a basis for the commission of an unfair labor practice within the intent and meaning of Section 8 (a) (1) of the Act.

2. The Circuit Court of Appeals erred in holding that ordinary life insurance salesmen Davis and Johnson were employees within the meaning of the Act.

3. The Circuit Court of Appeals erred in holding that in order to vest the Board with jurisdiction, it was not necessary for the Board to show that the so-called "unfair labor practices" affected interstate commerce.

4. The Circuit Court of Appeals erred in entering a decree enforcing the order of the National Labor Relations Board.

## I.

**The Decision of a Majority of the Circuit Court of Appeals in Effect Holding That Concerted Activity Directed to Any Aspect of the Employer's Business Is Within the Protection of the National Labor Relations Act Raises For the First Time Important Questions as to the Construction of Section 7 and Section 8(a) (1) of the Act.**

Two of the Circuit Court of Appeals judges who heard this case below concluded that the joint concern of Davis, Johnson and the other salesmen with the identity and capability of a new cashier to be employed by the Company was within the ambit of Section 7 of the Act.

The majority recognized that no union activity was involved and no collective bargaining contemplated. They further recognized that these salesmen had no authority to appoint a new cashier or even recommend anyone for the appointment, yet concluded that their concerted activity in this regard was properly within the words "other mutual aid or protection" of Section 7. The third judge, Judge Major, reached a contrary conclusion and so stated in his dissenting opinion (Tr. 11).

The section in question, which details the rights of employees under the Act, states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *."

Section 8 defines unfair labor practices under the Act. Sub-section (a) (1) thereof provides that it shall be an unfair labor practice for an employer:

> "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

The majority reasoned that the words "other mutual aid or protection" were unambiguous and required a construction which included the concerted activities appearing in the record in this case. Judge Major, on the contrary, reasoned that these activities were without the stated purpose of the Act and a reasonable interpretation thereof.

It is apparent upon examination that the language of Section 7 is a virtual restatement of the provisions of Section 7(a) of the National Industrial Recovery Act (48 Stat. 198, U. S. C., title 15, sec. 707 (a)). Both the Senate and House of Representatives Reports reporting out what was later to be Section 7 of the National Labor Relations Act recognized this fact (Senate Report No. 573, 74th Cong. 1st Sess. p. 9; H. R. Report No. 1147, 74th Cong., 1st Sess. p. 15). These reports further, we believe, recognized the basic uncertainty inherent in these words. Thus in Senate Report No. 573, it is stated at page 8:

> "Sections 7 and 8. Rights of employees—Unfair labor practices.—These sections are designed to establish and protect the basic rights incidental to the practice of collective bargaining. At this juncture the committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8. This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practices" means any unfair labor practice listed in Section 8', and by section 10 (a) empowering the Board to prevent any unfair labor practice 'listed in Section 8'. Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, this bill is specific in its terms. *Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices in their judgment are deemed to be unfair.*" (Italics ours.)

Yet in discussing the unfair labor practices enumerated

in Section 8, the first sub-section of which merely referred back to Section 7, it is stated at page 9:

> "The four succeeding unfair labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome."

In House Report No. 1147, Section 8 was discussed in these words (page 17):

> "The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4) and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1)."

It was soon urged that these broad implications of the words "other mutual aid or protection" should be extended to cover concerted activities whether previously lawful or unlawful.

This language, considered by itself, might well warrant this interpretation, but after several contrary rulings by the Board, it is now established that it was not the intention of the Act to protect unlawful concerted activities. *N. L. R. B.* v. *Sands Manufacturing Company,* 306 U. S. 332; *Southern Steamship Company* v. *N. L. R. B.,* 316 U. S. 31; *N. L. R. B.* v. *Indiana Desk Company,* 149 F. 2d 987 (1944).

The Company contends that it was likewise not the intention of the Act to protect concerted activities which are unrelated to the purposes which the Act is designed to serve. As Judge Major states in his dissenting opinion (Tr. 11):

> "It must be remembered that no labor dispute or labor union, or the right to form, join or assist a labor organization, or any right on the part of the

> salesmen, or refusal on the part of the respondent to bargain collectively, as those terms are defined by the Act and many times construed by the courts, are involved. Neither is there any grievance concerning wages, rates of pay, hours of employment or conditions of work. In fact, the grievance is not only petty but personal and private in its nature."

We contend that the contrary result reached by the majority of the Circuit Court of Appeals is without precedent and for the first time expands the meaning of the Act to cover mutual aid not related to collective bargaining, union activity, wages, hours, rates of pay or conditions of work. We made this same contention to the Circuit Court of Appeals, *yet the majority does not cite a single authority to support its decision adverse to our contention.*

As Judge Major points out, the present grievance is personal and private in its nature. In reality only the personal fortunes of two individuals, salesmen Davis and Johnson, are at stake. These individuals have assumed the role of private litigants by filing their so-called Additional Statement for the Record (Company's App. 1-8) and their Petition to Amend the Decision and Order of the Board (Company's App. 9-10). The Company can only conjecture as to the reason for the Board's interest in the matter, but submits that the entire proceeding represents an attempt by the Board to extend its jurisdiction beyond the bounds of the statute and beyond the limits which have heretofore been sanctioned by the Courts.

The decision of the majority of the Court below has broad implications. The record clearly shows that these salesmen were concerning themselves with a subject that has heretofore been considered the prerogative of management. If, as the majority of the Court holds, these individuals had a legitimate interest in the identity of the cashier because of the effect her efficiency might have upon their activities, why would they not have a similar interest

in the identity of the petitioner's president, its attorneys, or any of its other management functions? Judge Major felt that this result inescapedly followed from the majority decision.

If such is the case, management retains its identity under the Act in name only, for it seems to us that if concerted activities of this type are among the rights guaranteed to employees under Section 7 of the Act, that management must bargain collectively with respect to them. True the Board seeks to avoid such an implication in the present proceeding (Board's App. 31) but the result is there nevertheless. Certainly such a result is contrary to the manifest intention of the Act and should be so stated to be the case by this Court. Thus are raised in extreme form the issues of compulsory collective bargaining presented in the pension plan case: *In the Matter of Inland Steel Company and Local Union Nos. 1010 and 64, United Steel Workers of America (CIO)*, 77 N. L. R. B. 1, decided by the Board on April 12, 1948, and now pending before the Circuit Court of Appeals for the Seventh Circuit.

## II.

**Whether an Ordinary Life Insurance Agent Is an Employee or an Independent Contractor Is a Question of Substantial Importance Not Only Under the National Labor Relations Act But Also Under the Social Security Act and Internal Revenue Code.**

In recent years, the much litigated question as to the circumstances under which an individual is to be considered an employee on the one hand or an independent contractor on the other, has been before this Court and before the Congress of the United States on several occasions.

At the risk of repeating what to this Court is already obvious, we shall trace chronologically the treatment that

has been given to this subject. In *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U. S. 111, decided in 1944, this Court held that newsboys were employees within the meaning of the National Labor Relations Act. On July 26, 1946, the Trial Examiner issued his Intermediate Report in the present case. In reaching his conclusion that the ordinary life insurance salesmen involved in this proceeding were employees, he relied heavily on the decision of this Court in the *Hearst* case and so stated (Board's App. 28). The Board's order, issued on June 6, 1947, adopted this finding of the Trial Examiner (Board's App. 8). On June 23, 1947, Congress enacted certain amendments to the Act. One of these amendments, that to Section 2 (3), modified the definition of an employee so as to provide:

> "The term 'employee' * * * shall not include * * * any individual having the status of an independent contractor * * *"

An examination of the Congressional proceedings antecedent to the enactment of this legislation, amply demonstrates that it was the intention of Congress by virtue of the amendment to Section 2 (3) quoted above, to modify the interpretation of the employee-independent contractor relationship announced by this Court in the *Hearst* case. Thus in H. R. Report No. 245, 80th Cong., 1st Sess., p. 18, the Committee stated:

> "It is inconceivable that Congress, when it passed the (original) Act, authorized the Board to give to every word in the Act whatever meaning it wished. On the contrary, Congress intended then, as it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved (in the *Hearst* case), the Bill excludes 'independent contractors' from the definition of 'employee'."

Petitioner contends that the present issues must properly be determined under Section 2 (3) of the Act as thus amended on the authority of the decisions of this Court in *L. A. Young Spring & Wire Corporation* v. *N.L.R.B.*, 163 F. 2d 905 (C. C. A. Dist. of Col., 1947) (certiorari in effect denied—*Foreman's Association of America* v. *L. A. Young Spring & Wire Corporation*, 333 U. S. 837); *Budd Manufacturing Company* v. *N. L. R. B.*, 332 U. S. 840.

The Circuit Court of Appeals in our case so held but nevertheless concluded that an application of the common law standards in determining the relationship required a finding that the ordinary life insurance salesmen before this Court were employees.

Such was the sequence of events in so far as the amendment to National Labor Relations Act is concerned. In the meanwhile, a sharp conflict had developed in the District and Circuit Courts of Appeal with respect to the construction to be given the word "employee" under the Social Security Act. In *United States of America* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704, and *Bartels* v. *Birmingham*, 332 U. S. 126, all decided in June of 1947, this Court announced its views on the subject.

None of these cases concerned life insurance agents. This was not surprising, however, as in addition to the general Treasury Department regulations delineating coverage under the Act on the basis of the common law employee-independent contract delineation (United States Treasury Department Regulations 90, promulgated under Title IX of the Social Security Act, Art. 205), there were specific Treasury Department Regulations defining the status of life insurance agents (U. S. Treasury Department Regulations 107, filed September 13, 1940, Section 403.225). Under these regulations, life insurance agents compensated solely on a commission basis were excluded from coverage under the Social Security Act, while so-called industrial insurance agents were included thereunder. Similar

Treasury Department regulations excluded ordinary life insurance agents from the withholding provisions of the Internal Revenue Code (United States Treasury Department Regulations 111, Sec. 29.143-2).

In November of 1947, the Treasury Department, relying upon the decisions of this Court in the *Silk, Greyvan* and *Bartels* cases, proposed new regulations which generally would have brought all life insurance agents, among others, under the Social Security Act (Proposed United States Treasury Department Regulations published in F. R. Vol. 12 No. 232, dated November 27, 1947, at page 7966).

These proposed regulations in turn prompted Congressional action which culminated in June of 1948 in the enactment of P. L. 642, L. 1948 (hereinafter termed the "Gearhart Resolution"). This legislation amended Title XI of the Social Security Act so as to add the following italicized language to Section 1101 (a) (6) thereof:

> "The term 'employee' includes an officer of a corporation, *but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.*"

By the same bill, identical amendments were made to Section 1426 (d) and Section 1607 (i) of the Internal Revenue Code relating respectively to withholding of income taxes from compensation paid and to unemployment compensation payments.

The legislative history of the Gearhart Resolution shows that it intended to prevent the application of any other than common law tests in determining who is an independent contractor, even in the presence of the decisions of this Court in the *Silk, Greyvan* and *Bartels* cases. Thus in Report No. 1255 of the Senate Finance Committee, 80th Congress, 2nd Sess., it is stated at page 7:

"In view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

"But * * * if it be argued that the Supreme Court decisions establish a new definition of 'employee', then it is the purpose of this resolution (H. J. Res. 296) to establish its meaning according to the usual common-law rules, realistically applied."

In Report No. 1319 of the House Ways and Means Committee, 80th Congress, Second Session, the majority report stated at page 2:

"The Treasury, pursuant to the Administrative Procedure Act, approved June 11, 1946, published notice in the Federal Register to amend the existing regulations, and apply tests other than the usual common-law tests for determining employer-employee relationship.

* * * * * *

"It is claimed by the Treasury that the proposed regulations are made necessary by the decisions of the Supreme Court in the *Silk* case (1947) (67 S. Ct. 1463), the *Greyvan Lines, Inc.* (67 S. Ct. 1463), the *Bartels case* (1947) (67 S. Ct. 1547), and related cases.

"In these cases, the Court rejected the traditional and long-standing test of control as the sole basis for determining whether an individual is an employee."

Whereas the minority report stated at page 12:

"The Treasury Department has prepared regulations in accordance with the Supreme Court decisions. The employees affected are entitled to benefits, and certainly should not be deprived of such protection merely because of prior improper interpretation of the Social Security Act and the Internal Revenue Code. This will be the result, however, if the House Joint

> Resolution 296 is enacted. So, the bill would curtail social-security coverage. It cannot be disguised as maintenance of the status quo. Furthermore, it very probably would do greater harm than deprive the employees directly in question of the coverage originally granted them by Congress. Despite the intent to maintain the status quo, the bill, as amended, would prescribe the 'usual common-law rules' in determining the employer and employee relationship for social-security purposes."

No Treasury Department regulations have as yet been proposed construing the provisions of the Gearhart Resolution and no regulations have as yet been issued by the National Labor Relations Board construing the analogous provisions of Section 2 (3) of the Act. An examination of the conflicting District and Circuit Court of Appeals decisions on the subject only adds to the uncertainty and confusion.

Thus in this case, the Circuit Court of Appeals posed as the question for its determination, whether the life insurance salesmen before it were employees or independent contractors. In holding that they were employees, the Court relied solely on its decision in *Williams* v. *United States*, 126 F. 2d 129 (1942), cert. den. 317 U. S. 655. This case involved the status of a band leader under the Social Security Act, precisely the same type of person before this Court in the *Bartels* case. We have already alluded to the uncertainty which has arisen as to the scope of this Court's decision in the *Bartels* case, and to the fact that under existing Treasury Department regulations, ordinary life insurance salesmen are independent contractors within the meaning of the Social Security Act. Yet they are held in the present case to be employees under the National Labor Relations Act.

A majority of state court decisions as to the employee-independent contractor status of ordinary life insurance

agents are contrary to the decision of the court below. The following decisions hold ordinary life insurance agents to be independent contractors at common law: *New York Life Insurance Company* v. *Murphy*, 388 Ill. 316, 319, 320, 58 N. E. 2d 182 (1944); *Vert* v. *Metropolitan Life Insurance Company*, 342 Mo. 629, 117 S. W. 2d 252, 166 A. L. R. 1381 (1938); *American National Insurance Company* v. *Denke*, 128 Texas 229, 95 S. W. 2d 370, 107 A. L. R. 409 (1936); *Luquire Insurance Co.* v. *McCalla*, 244 Ala. 479, 13 So. 2d 865 (1943); and *American Savings Life Insurance Co.* v. *Riplinger*, 249 Ky. 8, 60 S. W. 2d 115 (1933).

The following decisions on the other hand hold them to be employees: *Chatelain* v. *Thackeray*, 98 Utah 525, 100 Pac. 2d 191 (1940); and *Life and Casualty Co.* v. *Unemployment Compensation Commission of Virginia*, 178 Va. 46, 16 S. E. 2d 357 (1941).

We submit that the above analysis amply demonstrates that, in view of the recent legislation on the subject, a further delineation by this Court of the line between an employee and an independent contractor is highly essential to a proper administration and uniform application not only of the National Labor Relations Act but also the Social Security Act; that this is particularly true in the case of life insurance agents, a group whose large numbers play a vital role in our national economy.

## III.

**The Holding of the Circuit Court of Appeals That the So-Called "Unfair Labor Practices" Need Not Be Shown to Have Been a Burden Upon Interstate Commerce Is Contrary to the Intention of the Act, to Previous Decisions of This Court and the Previous Decisions of the Circuit Court of Appeals.**

The record amply shows that the petitioner carries on a general nation-wide insurance business and in its overall operations is engaged in interstate commerce within the decisions of this Court. It has been contended that this fact in and of itself vested the Board with jurisdiction under the Act. Thus, the Trial Examiner found (Board's App., p. 22):

> "Once it is established that unfair labor practices have occurred in an industry engaged in interstate commerce, or in an industry whose business affects interstate commerce, the Board is charged with the responsibility of correcting them."

The Board in its order adopted this finding of the Trial Examiner without qualification. The Court, we believe, reached its decision on this same basis, for it found that the Board need not show that the asserted unfair labor practices had been a burden on interstate commerce or that there was an actual stoppage in the flow of such commerce or an immediate likelihood thereof.

Petitioner urges that this result is contrary to the plain intention of the Act and to previous decisions of this Court and this same Circuit Court of Appeals. Section 10 (a) of the Act provides that in order to vest the Board with jurisdiction, the so-called unfair labor practices must affect interstate commerce. Section 2 (7) of the Act defines "affecting commerce" as follows:

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In *N.L.R.B.* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, this Court established the following standard for the construction of this language (pages 31 and 32):

"This definition (of the words 'affecting commerce') is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. (Citing cases.) It is the effect upon commerce, not the source of the injury, which is the criterion."

* * * * *

"Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed."

This standard was followed in *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.*, 303 U. S. 453 where this Court stated at page 467:

"The question that must be faced under the Act upon particular facts is whether the unfair labor prac-

tices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

To like effect, the Circuit Court of Appeals for the Seventh Circuit posed the issue in *Indianapolis Power & Light Co.* v. *N.L.R.B.*, 122 F. 2d 757, 759-760 (1941), in these terms:

"* * * did the alleged unfair labor practices actually threaten interstate or foreign commerce in a substantial manner, * * *"

These decisions thus define the limits of the Board's jurisdiction not in terms of the general nature of the employer's operations, but in terms of the effect of the *particular* alleged unfair labor practices (which concern the activities of both the employer and employee) upon interstate commerce. It seems to us that only by weighing the facts of each case in the light of this standard, is the requirement of the Act that the unfair labor practices affect commerce given any meaning. The decision in the instant case announces a far different standard which is clearly at variance with what has heretofore been considered the established rule. The result produces a conflict of decision and confusion that should be resolved by this Court.

## IV.

### Suggestions.

It is respectfully submitted that the issues determined by the Circuit Court of Appeals in this case raise broad issues as to the spirit in which the National Labor Relations Act is to be interpreted and the purposes which it is designed to serve. As the events of the last two years have shown, it is the wish of the American people that the Act serve as a means of fairly balancing the interests of labor and management to the end that the two groups may work harmoniously together to promote the common weal.

The decision of the majority of the Circuit Court of Appeals in this case is patently contrary to this pattern. Its implications deny management any identity whatsoever under the Act, and places the extraordinary machinery provided for in the Act to protect public rights in the hands of individuals who wish to advance only their own personal interests.

Judge Major clearly recognized this result in his dissenting opinion. The case is without precedent and raises for the first time questions as to the construction to be given to the Act which go to the very heart of the labor-management relationship. For this reason, petitioner urges that the judgment of the Circuit Court of Appeals be reviewed by this Court as provided by law.

Respectfully submitted,

TOM LEEMING,
OWEN RALL,
RICHARD V. HENRY, JR.,
*Attorneys for Petitioner.*